Office - Supreme Court, U.S.
FILED
JAN 7 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 680

WABASH RAILROAD COMPANY,
a corporation,
Petitioner,

vs.

WILLIAM LINK,
Respondent.

Petition for Writ of Certiorari

TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JOHN L. DAVIDSON, JR.
1667 Railway Exchange Bldg.
St. Louis 1, Missouri
L. DUNCAN LLOYD
135 South LaSalle Street
Chicago, Illinois
Counsel of Record for Petitioner.

GEORGE T. SCHILLING
801 Lafayette Life Bldg.
Lafayette, Indiana
CHARLES P. LIPPERT
1667 Railway Exchange Bldg.
St. Louis 1, Missouri
Of Counsel.

UNITED STATES LAW PRINTING CO., CHICAGO 18, ILL., LA KEVIEW 5-6581

INDEX.

	PAGE
Opinions Below	2
Jurisdiction	2
Question Presented	2
Statutes Involved	2
Statement of the Case	4
Reasons for Granting the Writ	5
1. The decision of the Court of Appeals is in irreconcilable conflict with the applicable decisions of the Indiana courts.	5
2. The question here presented has great importance and far reaching effect transcending the interest of the immediate parties hereto.	7
Conclusion	8
Appendix A—Order of Dismissal of The United States District Court, Northern District of Indiana, Hammond Division, November 30, 1955.	9
Appendix B—Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.	10

PAGE

CITATIONS

Cases

Carmichael v. Baltimore & O. R. Co., 121 Ind. App. 463, 98 N. E. 2d 698 (1951) 5,6

Cleveland, C. C. & St. L. Ry. Co. v. Gillespie, 96 Ind., App. 535, 173 N. E. 708 (1930) 4

Erie Railroad Co. v. Tompkins, 304 U. S. 64 5,7

Gibson v. Lockheed Aircraft Service, Inc., 350 U. S. 348, 100 L. Ed. 300 (1956) 8

Killion v. Chicago, M., St. P. & P. R. Co., 107 Ind. App. 527, 25 N. E. 2d 647 (1940) 5

Morley v. Cleveland, C. C. & St. L. Ry. Co., 100 Ind. App. 515, 194 N. E. 806 (1935) 5

Pennsylvania R. R. Co. v. Huss, 96 Ind. App. 71, 180 N. E. 919 (1932) 4

Statutes and Constitutional Provisions

Acts of General Assembly of Indiana, 1939, Chapter 48, Section 55, p. 289 3

Burns Indiana Statutes Annotated, 1952 Replacement Volume, Section 47-2004 3

Judicial Code, 28 U. S. C., Sec. 1652 2

United States Code, 28, 1254 (1) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No.

WABASH RAILROAD COMPANY,
a corporation,

Petitioner,

vs.

WILLIAM LINK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The Wabash Railroad Company, Petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above case on October 10, 1956.

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Indiana entered November 30, 1955 (R. 8), was not reported. (Appendix A) The opinion of the United States Court of Appeals for the Seventh Circuit entered October 10, 1956, is reported at 237 F. 2d 1. (Appendix B).

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on October 10, 1956. Petitioner's Petition for Rehearing was denied November 1, 1956. The jurisdiction of this Court is invoked under 28 United States Code 1254 (1).

QUESTION PRESENTED

Whether a Court of Appeals may, in deciding a case under its appellate jurisdiction by virtue of diversity of citizenship of the parties, apply substantive law which is in direct and irreconcilable conflict with the law of the state from which the case was appealed as repeatedly set forth by the appellate courts of that state?

STATUTES INVOLVED

Section 1652 of the Judicial Code (28 U. S. C., Sec. 1652):

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

Acts of General Assembly of Indiana, 1939, Chapter 48, Section 55, p. 289; Acts of 1953, Chapter 163, Section 1, p. 576. (Burns Indiana Statutes Annotated, 1952 Replacement Volume, Section 47-2004):

"(a) No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing. In every event speed shall be so restricted as may be necessary to avoid colliding with any person, or vehicle or other conveyance on or near, or entering the highway in compliance with legal requirements and with the duty of all persons to use due care."

"(d) The driver of every vehicle shall, consistent with the requirements in subsection (a), drive at an appropriate reduced speed when approaching and crossing an intersection or railway grade crossing, when approaching and going around a curve, when approaching a hill crest, when traveling upon any narrow or winding roadway, and when special hazards exist with respect to pedestrians or other traffic or by reason of weather or highway conditions."

STATEMENT OF THE CASE.

The complaint is summarized in the opinion of the Court of Appeals. (Appendix B, pp. 10 to 17). The material ultimate facts alleged are:

> Petitioner's railroad tracks in Porter County, Indiana, crossed a blacktop state highway at grade. The crossing was unlighted and protected only by a crossarm. Petitioner had placed a black coal car on the crossing and several lighter colored cars to one side of the crossing. Respondent frequently used the crossing and he drove his truck toward it on this dark night. The lighter colored cars were visible in his headlights but the coal car was not. Petitioner had frequently placed such lighter colored cars to one side on preceding nights and left the crossing open. Respondent's truck had good headlights and brakes. He was alert and keeping a lookout. Nevertheless, "he was caused to collide with this coal car" (R. 3-6).

The only negligence charged was the failure to give Respondent a warning of the presence of the coal car on the crossing.

Petitioner's answer denied the negligence charged and affirmatively pleaded contributory negligence. (R. 7). Petitioner then moved for judgment on the pleadings asserting that the complaint was legally insufficient. (R. 8). The District Court granted the motion and dismissed the case by Memorandum Opinion citing five Indiana decisions.[1]

---

[1] **Cleveland, C. C. & St. L. Ry. Co. v. Gillespie,** 96 Ind. App. 535, 173 N. E. 708 (1930).

Pennsylvania R. R. Co. v. Huss, 96 Ind. App. 71, 180 N.E. 919 (1932).

Respondent appealed. The Court of Appeals reversed, and without any discussion of the cases cited by the District Court, held there were no applicable Indiana decisions. The opinion stated that the circumstances of the accident were "unlike any involved in the Indiana cases cited." To support its conclusion that the complaint was legally sufficient, the opinion cited one case decided by the Supreme Court of Indiana under Kentucky law in which the motorist was held guilty of contributory negligence as a matter of law, and one case involving an approaching train decided by this Court under general federal law before *Erie Railroad Co.* v. *Tompkins*.[2] The opinion completely ignored the issue of Respondent's contributory negligence.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals is in irreconcilable conflict with the applicable decisions of the Indiana courts.

The Court of Appeals stated that the circumstances of the accident were "unlike any involved in the Indiana cases cited." The circumstances were, as stated by the Court of Appeals, that "on a dark night it (Petitioner) stopped its train with a black coal car across a black highway." (Appendix B, p. 14). As a matter of fact, in the five decisions cited by the District Court as controlling, the Indiana

---

Morley v. Cleveland, C. C. & St. L. Ry. Co., 100 Ind. App. 515, 194 N. E. 806 (1935).

Killion v. Chicago, M., St. P. & P. R. Co., 107 Ind. App. 527, 25 N. E. 2d 647 (1940).

Carmichael v. Baltimore & O. R. Co., 121 Ind. App. 463, 98 N. E. 2d 698 (1951).

(R. 8, 9).

[2] **Erie Railroad Co. v. Tompkins**, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938).

courts passed upon the duties of the railroad and the motorist under identical circumstances. For the sake of brevity, we limit our discussion to two of the five Indiana cases relied upon by the District Courts.

In *C. C. C. & St. L. Ry. Co.* v. *Gillespie,* 96 Ind. App. 535, 173 N. E. 708 (1939) the hopper car and coal car were painted black, they were standing on an asphalt highway, the night was dark. A jury verdict in favor of the plaintiff, a guest passenger, was reversed. The court, holding the sole negligence to be that of the driver, stated:

> "It was negligence, *as a matter of law,* for Usher to drive his automobile, with his vision obscured in the manner and to the extent as shown by the evidence, at such a speed that he could not stop his automobile within the distance that objects could be seen ahead of it." (Emphasis added.) 96 Ind. App. at 550, 173 N. E. at 714.

In *Carmichael* v. *B. & O. R. R. Co.,* 121 Ind. App. 463, 98 N. E. 2d 698 (1951), it was alleged that on an extremely dark night, plaintiff drove into a *black coal car* which blended with the darkness of the night and the dark wooded areas behind the crossing. In sustaining a demurrer to the complaint, the court noted that there were no obstructions to the driver's vision and stated:

> "The conclusion is inescapable that had he exercised the care of a reasonably prudent man in looking in the direction in which he was driving he would necessarily have seen the train before he got so close thereto that a collision was inevitable. The omission of the alleged duty of appellee to give warning of the presence of its tracks and train is shown upon the face of the complaint not to have been the cause of the collision and injury. *The complaint shows that appellant was guilty of contributory negligence as a matter of law.*" (Emphasis added.) 121 Ind. App. at 471, 472, 98 N. E. 2d at 701-702.

To say that the circumstances of the instant case are "unlike any involved in the Indiana cases cited" and to dismiss those cases with the bare assertion that they do not apply is clearly and unquestionably wrong. The conclusion is inescapable that the Court decided the case according to its own views without regard for the state law. To disregard these precedents, which the federal trial judge long experienced in Indiana law deemed authoritative, without distinguishing or even discussing them anew creates the area of uncertainty *Erie* v. *Tompkins* dispelled.

2. The question here presented has great importance and far reaching effect transcending the interest of the immediate parties hereto.

The importance of the issues flows from the important national obligations assigned to the railroad carriers. In Indiana, and particularly in the Calumet area where this accident occurred, these carriers are transporting goods through one of the most highly industrialized and densely populated sections of America—linking east and west and the nation's railroad center with the south. It is of vital importance to the public and to the carriers that the legal obligations arising from these operations be clearly defined and uniformly applied in the state and federal courts. Uncertainty breeds litigation and prevents the equitable adjustment of claims. Both the public and the carriers are entitled to the protection of this court in assuring that the law of the state shall apply. Unless such protection is afforded, *Erie Railroad* v. *Tompkins* becomes meaningless.

Petitioner submits the decision of the Court of Appeals is so "obviously and injuriously erroneous" that in the interest of sound judicial procedure and the necessity of maintaining the proper relationship between the state and

federal courts, this writ should be granted and this decision reviewed in the exercise of the supervisory powers of this Court.[3]

CONCLUSION.

1. The Court of Appeals decision, if upheld by the refusal of this court to grant certiorari, will be in irreconcilable conflict with the applicable substantive law as repeatedly stated by the Indiana courts.

2. The resulting conflict will create an unwarranted confusion burdensome to all common carriers by railroad in the State of Indiana and to the public generally. The evil of "forum shopping" will have been given rebirth. The issues clearly transcend the immediate interests of the parties hereto.

3. The problem is recurrent.

For these reasons it is respectfully submitted that this petition for writ of certiorari should be granted.

Respectfully submitted,

JOHN L. DAVIDSON, JR.
L. DUNCAN LLOYD
Counsel of Record for Petitioner.

GEORGE T. SCHILLING
CHARLES P. LIPPERT
Of Counsel.

---

[3] **Gibson v. Lockheed Aircraft Service, Inc.**, 350 U. S. 348, 100 L. Ed. 300 (1956).

APPENDIX A

THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF INDIANA

HAMMOND DIVISION

William Link

—*vs*—

Wabash Railroad Company
a corporation

No. 1639 Civil

ORDER OF DISMISSAL

Defendant's motion for judgment on the pleadings is granted. It is ordered that this cause be and it is hereby dismissed at plaintiff's costs. *Cleveland C. C. & St. L. Ry. Co.* v. *Gillespie,* 96 Ind. App. 535, 173 N. E. 708 (1930), *Pennsylvania R. Co.* v. *Huss,* 96 Ind. App. 71, 180 N. E. 919 (1932), *Morley* v. *Cleveland, C. C. & St. L. Ry. Co.,* 100 Ind. App. 515, 194 N. E. 806 (1935), *Killion* v. *Chicago, M., St. P. & P. R. Co.,* 107 Ind. App. 527, 25 N. E. 2d 647 (1940), *Carmichael* v. *Baltimore & O. R. Co.,* 121 Ind. App. 463, 98 N. E. 2d 698.

Enter:

.....

Judge

Hammond, Indiana

November 30, 1955

APPENDIX B

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 11681 September Term, 1956, September Sessio.

William Link,
Plaintiff-Appellant,
v.
The Wabash Railroad Company, a corporation,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

October 10, 1956

OPINION.

Before FINNEGAN and SCHNACKENBERG, Circuit Judges, and WHAM, District Judge.

SCHNACKENBERG, Circuit Judge.

Plaintiff sued defendant in the district court to recover damages for injuries alleged to have been sustained by him when he drove an automobile into a collision with defendant's train standing across a highway in Indiana. Defendant answered and later filed a motion for judgment on the pleadings and to dismiss the case.

The district court entered an order in favor of the defendant in accordance with its motion, from which order this appeal is taken.

The pertinent parts of the complaint, which were denied by defendant's answer, are as follows:

> "* * * there was a grade crossing where defendant's railroad crossed a north and south highway, designated by the state as Indiana Highway 149, * * *. This highway 149 was covered with black top. The crossing was unlighted and was not protected by gates, flasher lights or any other mechanical warning device of the defendant, except a cross arm, to warn travelers on the highway of the presence of a train approaching or standing on the crossing.
>
> "Defendant's coal car, hereinafter described, with which plaintiff's truck collided, was then and there under the control of defendant's train crew, who had placed it in the position where the collision occurred, and this train crew in so doing were then and there acting in the course of their employment as defendant's employees.
>
> "On October 30, 1953, at about 3 A.M., plaintiff was returning home from work, driving his 1937 Ford half-ton truck. He turned off U.S. 20 and started south on said highway 149 toward said railroad crossing which was a short distance to the south. His truck collided with one of defendant's cars standing on this crossing. This collision was a direct and proximate result of defendant's negligence * * * in the following respects:
>
> "(a) Defendant had created a situation at this crossing at that particular time which in fact made the crossing extra hazardous at that time by giving a false and deceptive appearance of safety, which was likely to and did deceive and entrap an approaching motorist of [sic] using ordinary care [sic] such as plaintiff. More particularly: It was a dark night. This was a two-lane black top highway. It had recently been covered with a fresh coating of blacktop.

Defendant placed a black coal car across this highway at this crossing so that the color of the black car blended with the black highway. At one side of the crossing, defendant had placed several cars of lighter color. These were clear of the highway but close to the coal car. These lighter cars were visible to plaintiff by his headlights as he approached the crossing, but this coal car was not. These lighter cars, in conjunction with the black coal car across the black highway created a false appearance and illusion to an approaching motorist in plaintiff's situation that the crossing was open and that the defendant had placed a string of cars to one side of the crossing so as to leave it open for travel. This deception in this situation that night was also aided and increased by the fact that the defendant had frequently placed such light colored cars at one side of the crossing in a similar manner on preceding nights so as to leave the crossing open for travel. The appearance of the crossing that night to motorists frequently using it, such as plaintiff, was similar to that on previous nights when it had been open. In this situation which in fact existed at this crossing that night, a person using ordinary care in the position of defendant's train crew would have known that motorists using ordinary care such as plaintiff were in danger of being deceived and entrapped into colliding with this coal car, and would have used care to prevent this deceptive situation either by not placing this particular black car in this position relative to the highway and relative to the lighter cars, or by placing some kind of temporary warning at the crossing by means of a light or crew members, or any other means sufficient to warn the motorist of this hidden danger confronting him. This train crew then and there knew, or in the exercise of ordinary care should have known, all the facts above set forth in this paragraph, but nevertheless they neglected and failed to do anything to warn the plaintiff of this particular peril that night. As plaintiff approached this crossing that night, he had his

> truck equipped with good and adequate headlights and brakes, he was alert and keeping a look-out and was using ordinary care for his own safety. But nevertheless, by reason of the aforesaid situation and said negligence of the defendant, he was caused to collide with this coal car."

Plaintiff makes no contention that, in entering the order from which this appeal is taken, any rule of practice was violated. His counsel in oral argument specifically waived that contention. Both parties rely upon the substantive law of Indiana. Plaintiff contends that that state's more recent cases have shown an increasingly liberal and sensible attitude in leaving to juries the question of whether the respective conduct of a railroad's employees and a motorist measures up in fact to the conduct of an ordinarily prudent person under circumstances like those in the particular situation where the accident occurs. This contention defendant disputes. It argues that the only negligence charged in the complaint is a failure to warn of the presence of the railroad car with which plaintiff's car collided. In asking us to affirm the order of the district court, it says that the questions decided by the district court "*as matters of law*"[1] and now presented to this court are these:

> "Does the complaint allege sufficient facts to impose on defendant a legal duty to give plaintiff such warning? If so, was such alleged failure the proximate cause of the collision? Was plaintiff guilty of contributory negligence?"

The complaint makes no charge of a violation of statutory duty by the defendant. It is based upon a charge of common law negligence.

---

[1] Emphasis supplied.

In *New York Central R. R. Co.* v. *Casey*, 1938, 214 Ind. 464, at page 469, 14 N.E. 2d 714, 716 the court said:

> "In the absence of a statute, negligence must be founded upon a violation of the duty to exercise that degree of care for the safety of others that an ordinarily reasonable person would exercise under the same or similar circumstances. Where the facts are in dispute, or where more than one reasonable inference may be drawn from the facts, negligence is to be determined as a fact by the jury, but where the facts are not in dispute, and only one reasonable inference may be drawn, negligence is a pure question of law."

In the same case, at page 469 of 214 Ind., at page 717 of 14 N.E. 2d, after citing *Pennsylvania Railroad Co.* v. *Huss*, 1932, 96 Ind. App. 71, 78, 180 N.E. 919, 921; *Cleveland C. C. & St. L. Ry. Co.* v. *Gillespie*, 1931, 96 Ind. App. 535, 173 N.E. 708; and *Morley* v. *Cleveland C. C. & St. L. R. R. Co.*, 1935, 100 Ind. App. 515, 194 N.E. 806, the court said:

> "It is pointed out in those cases that neither the statute nor the common law requires a railroad company to give notice by signal or otherwise that one of its trains is standing upon or moving over a highway crossing unless ordinary care for the safety of others would require it."

The complaint charges in effect that defendant created a temporarily and peculiarly hazardous condition when, on a dark night, it stopped its train with a black coal car across the black top highway. It is the theory of plaintiff that the collision resulted from that condition and the alleged failure of defendant's employees to warn plaintiff. Moving trains are more easily seen at night than those which are stationary. *Carmichael* v. *Baltimore & O. R. Co.*, 1951, 121 Ind. App. 463, at page 471, 98 N.E. 2d 698. The creation by the defendant itself of this haz-

ardous condition at the crossing is a special circumstance unlike any involved in the Indiana cases cited. However, the Indiana court in *Louisville & N. R. Co.* v. *Revlett,* 1946, 224 Ind. 313, at page 322, 65 N.E. 2d 731, 734, considered a case arising under the law of Kentucky and stated:

> "Under the law of Kentucky a person who drives into the side of a train standing or moving over a grade crossing cannot, in the absence of special circumstances rendering the crossing peculiarly hazardous, recover from the railroad company. *Chesapeake & O. Ry. Co.* v. *Switzer,* 1938, 275 Ky. 834, 122 S.W. 2d 967, 968.
>
> "In the last mentioned case the court quoted with approval the following language from *Jones* v. *Atchison, T. & S. F. Railway,* 1929, 129 Kan. 314, 282 P. 593:
>
> "'Under ordinary circumstances, a freight train standing across a highway on a dark and foggy night will sufficiently reveal itself to travelers exercising due care in the operation of auto vehicles which are equipped with proper lights and which are driven at a proper rate of speed under the conditions. • • •'
>
> "It will be noted that the case of *Chesapeake & O. Ry. Co.* v. *Switzer, supra,* excepts from the rule therein laid down crossings where special circumstances renders [sic] the same peculiarly hazardous. • • •"

The court then cited *Louisville & N. R. Co.* v. *Mahoney,* 1927, 220 Ky. 30, 294 S.W. 777 and said that, in that case,

> "• • • it was dark and raining and there was a sharp curve in the highway very near to the crossing, so it was well-nigh impossible for one approaching the same to see a train until almost reaching the track. The court held under these circumstances, a driver who is well acquainted with the crossing and its surroundings and of the gong and wig-wag there situated, was entitled to a warning signal where the crossing is obstructed by a train, the same as is required to be given by the trainmen of an approaching train."

From these authorities, we deduce that a reasonable inference might be drawn by a jury, from the facts alleged in the complaint, to the effect that the defendant's placing of the black coal car across the highway on a dark night was the creation of special circumstances rendering the crossing peculiarly and temporarily hazardous, and that this conduct, together with defendant's failure to warn plaintiff, constituted negligence proximately causing the collision. It is true that more than one reasonable inference might be drawn from these facts. In that situation the question of negligence should have been determined as a fact upon a trial. Of course, we express no opinion as to which inference should be drawn.

In the absence of an Indiana case directly applicable to the special circumstances set up in the complaint here, we are also justified in citing *Pokora* v. *Wabash Ry. Co.*, 1934, 292 U.S. 98, 54 S. Ct. 580, 78 L. Ed. 1149, which involved a crossing accident in Springfield, Illinois. In that case, a directed verdict for the defendant railway company was granted. From the Supreme Court's opinion it appears that plaintiff stopped his truck and listened when he was about 10 or 15 feet east of a switch track. A string of box cars standing on the switch track about 5 to 10 feet from the street upon which he was traveling, cut off his view of the tracks to the north. There was neither bell nor whistle. Still listening, he crossed the switch track, and, reaching the main track, was struck by a passenger train coming from the north. Plaintiff was making his crossing in the daytime. The court said, 292 U.S. at page 101, 54 S. Ct. at page 581:

> "* * * A jury, but not the court, might say that with faculties thus limited, he should have found some other means of assuring himself of safety before venturing to cross. * * * Indeed, the statutory signals

did not exhaust the defendant's duty when to its knowledge there was special danger to the traveler through obstructions on the roadbed narrowing the field of vision. * * * All this the plaintiff, like any other reasonable traveler, might fairly take into account. All this must be taken into account by us in comparing what he did with the conduct reasonably to be expected of reasonable men."

In reversing and remanding the case, the court in 292 U.S. at page 105, 54 S. Ct. at page 583, used this significant language:

"* * * Extraordinary situations may not wisely or fairly be subjected to tests or regulations that are fitting for the common place or normal. In default of the guide of customary conduct, what is suitable for the traveler caught in a mesh where the ordinary safeguards fail him is for the judgment of a jury."

Accordingly, the judgment of the district court is reversed and the case is remanded for trial.

Reversed and remanded.